Southern R. Co., 164 Fed. 347. The United States Supreme Court in deciding the principal case practically adopted the above argument of the lower court.

A few decades ago the legal theories advanced in the principal case would probably have been severely criticised and regarded as a just cause for alarm. At the present time, these same theories, will, we think, be met with approbation by practically everyone. Moreover, there has been a great change in the personnel of our Supreme Court, and that tribunal is apparently becoming more responsive to the needs of our advancing civilization. If the position maintained in the principal case may be regarded as an indication of the adoption of a correspondingly advanced general policy, it should meet with double approval. P. P. F.

THE RIGHT OF A TRUSTEE OF A BANKRUPT PARTNERSHIP TO ADMINISTER THE INDIVIDUAL ESTATE OF AN UNADJUDICATED PARTNER AGAINST HIS WILL OR CONSENT.—The whole law of the bankruptcy of partnerships is in a state of transition, and therefore in great confusion: one point on which the courts are most hopelessly divided is this: when a partnership and some, but not all, of its members have been adjudicated bankrupt, can their trustee administer together with the partnership estate, the individual estate of a partner not adjudicated bankrupt, against his will?

The determination of this question depends entirely upon the construction to be given to Section 5, clauses a and h of the Bankruptcy Act of 1898. The precise point has arisen in four of the Circuit Courts of Appeals, and there is considerable variance in both the reasoning and the result of the decisions.

In the Second Circuit the question was determined for the first time in the case of *In re Meyer*, 98 Fed. 976, decided in 1899, wherein it was held: "That it is the scheme of these provisions to treat the partnership as an entity which may be adjudged a bankrupt by voluntary or involuntary proceeding, irrespective of any adjudication of the individual partners as bankrupt, and upon an adjudication to draw to the administration the individual estates of the partners as well as the partnership estate, and marshal and distribute them according to equity."

The question arose next in the Sixth Circuit in 1905 in the case of *Dickas* v. *Barnes*, 140 Fed. 849, where it was held that the court, in administering the estate of a bankrupt partnership, has power to take possession of the property of a partner, although he has not been, and could not be, adjudged a bankrupt individually, and to administer the same as far as necessary to the settlement of the partnership estate; the reason being that though a partnership is an entity, when that entity is declared bankrupt all its assets and resources are subject to the jurisdiction of the court, and as each partner is liable for the firm debts, his individual property stands charged as one of the resources of that entity; thus placing the Second and Sixth Circuits together in result, though not in reasoning.

In the Eighth Circuit, the question arose in 1907 in the case of *In re Bertenshaw*, 157 Fed. 363, where Judge SANBORN said, in construing these sec-

tions: "No express provision can be found in this legislation and no indication or implication is perceived in it that an adjudication of a partnership draws into the administration of its estate in the court of bankruptcy the property of the solvent partners who are not adjudged bankrupts."

The latest pronouncement by a Circuit Court of Appeals on this question was in March, 1911, when Judge LANNING of the Third Circuit said in *Francis* v. *McNeal,* 186 Fed. 481, "It is settled that a partnership is an entity which may be adjudged a bankrupt, irrespective of an adjudication of bankruptcy against any of its members * * * undoubtedly in a case where a partnership and all its members have been adjudged bankrupts, the trustee of the partnership may administer the estates of a partnerhip and its members, and as we read Sec. 5, the trustee of a partnership which has been adjudged a bankrupt may in certain cases to be hereafter mentioned, administer the estates of its unadjudicated members."

From this cursory survey of the adjudications in the Circuit Courts of Appeals, it can be readily seen that three of the Circuits agree in result (although only two arrive at that result by the same reasoning), and that two of the decisions, *In re Meyer* and *In re Bertenshaw,* are diametrically opposed, both in reasoning and in result.

In the District Courts the question has appeared several times, and there also the determinations differ greatly, both in reasoning and in result. To attempt to reconcile these divergent views is impossible, but to present the condition of the law which produced them is the purpose of this note.

The question has presented itself in various forms, and has therefore been viewed from different angles.

The first manner in which the courts were confronted with the question was in construing § 5a, which provides as follows: "PARTNERS. A partnership during the continuance of the partnership business or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt." Shortly after the passage of the Act, Judge THOMAS, in *Chemical Nat. Bank* v. *Meyer,* 92 Fed. 896, said: "Congress has endowed all partnerships with something of the nature of a separate and distinct entity"; and that a partnership is, for the purposes of this Act, at least, such an entity for some if not for all purposes in bankruptcy, has never been seriously questioned except in the case of *In re Forbes,* 128 Fed. 137, which long since has been overruled, so that now it is clear that a partnership is an entity for bankruptcy purposes to the extent that it, as an entity, can be adjudged bankrupt, regardless of whether or not its members, all or any, are so adjudged. *In re Meyer,* 92 Fed. 896, 98 Fed. 977; *Strause* v. *Hooper,* 105 Fed. 590; *In re Solomon & Carvel,* 163 Fed. 140; *In re Perlhefter,* 177 Fed. 299; *In re Everybody's Market,* 173 Fed. 492; *In re Junck & Balthazard,* 169 Fed. 481; *In re Ceballos & Co.,* 161 Fed. 451; COLLIER, BANKRUPTCY, Ed. 8, p. 115 and notes; 1 REMINGTON, BANKRUPTCY, § 59, and citations; 8 COL. L. REV., p. 599.

The second way in which the question was presented was in calling for the determination whether or not a partnership, as such, was insolvent. In cases of this class, of course the primary question is solvency; but in determining that, the questions of what are and what are not partnership assets, and of

what partnership assets are involved in the adjudication, are questions inherently involved. The decisions on this phase of the question divide into two distinct classes. On the one side are cases holding that a partnership is a person within the meaning of the term as used in the definition of insolvency in the Act, § 1 (15) and that, "If a partnership (the entity that may be adjudged bankrupt) has not assets sufficient at a fair valuation to pay its debts, then the partnership is insolvent, and no property which in the first instance is devoted to the payment of the individual debts of the partners, can be considered in determining the solvency or insolvency of the partnership as such. On the question of insolvency the firm and its individual members are practically strangers to each other." *In re McMurtrey & Smith,* 142 Fed. 853. *Accord*: *In re Bertenshaw,* 157 Fed. 371; *In re Everybody's Market,* 173 Fed. 492. On the other side are cases determining that as each partner is liable *in solido* for the debts of the company, so that they are debts of each individual member as much and as truly as they are debts of the firm, a partnership cannot be said with strictness to be insolvent while any one of the partners is able to pay all of the firm's liabilities. *In re Blair,* 99 Fed. 76; *Vaccaro* v. *Security Bank,* 103 Fed. 436; *Davis* v. *Stevens,* 104 Fed. 235 at 242; *In re Perley,* 138 Fed. 927; *In re Perlhefter,* 177 Fed. 299; LOVELAND, BANKRUPTCY (Ed. 3) 187, n. 20, seems to lean toward the latter view, while the other texts, as is their wont, gracefully dodge the issue and cite cases on both sides. COLLIER, Ed. 8, p. 119; 1 REMINGTON, § 60.

The third manner in which this question comes before the courts is in the construction of § 5h, which reads: "In the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy unless by consent of the partner or partners not adjudged bankrupt, but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit and account for the interest of the partner or partners adjudged bankrupt." Here again is a direct conflict in opinion, Judge SANBORN declaring that: "When a partnership and one or more of the partners but not all of them, are adjudged bankrupt, those who are not so adjudged may administer the partnership property, *a fortiori* their individual property, and the court may not do so without their consent, but if the unadjudicated members consent, the court may administer the partnership property and their individual estates. Provisions thus interpreted are fair, just and reasonable. * * * The solvent partner is more competent to manage the individual property and the property of his firm which he had the shrewdness and ability to accumulate, more competent to convert them into money and to apply them on his obligations, than any trustee chosen by his creditors can be." *In re Bertenshaw, supra.* This view is upheld also in *In re Junck & Balthazard,* 169 Fed. 481 and *In re Solomon & Carvel,* 163 Fed. 140. On the other hand, it has been held that subdivision h of § 5 "applies only to a case where less than all of the members of a partnership, but not the partnership, have been so adjudged." *Francis* v. *McNeal* (C.C.A.) 186 Fed. 481; *In re Ceballos & Co.,* 161 Fed. 451 at 453.

The fourth situation is not so common as the others, and is useful only

in that it presents the converse of the question in issue, and definitely determines the disposition of the situation where all the members of a firm are adjudicated bankrupts, but where there has been no adjudication against the firm; under such circumstances it has been held that the trustee appointed in the individual cases has no authority to interfere with the firm assets, although all the cases were instituted simultaneously by the same creditor and the same trustee was appointed for all partners. *In re Mercur,* (C.C.A.) 122 Fed. 384, at 388.

With this brief résumé of the leading cases, it seems that the various phases of the principal question are laid before us. Is there any thread to follow to lead us out of this maze of conflicting views?

The point upon which each decision ultimately turns is the extent to which the entity doctrine is to be applied; the various courts have come to different conclusions because they have applied various attributes to the partnership as an entity and to the individual members as individuals and as partners. It is the extent of the application of this doctrine, then, that in the last analysis determines whether or not an unadjudicated partner's individual property is to be administered by the trustee of the partnership.

For a partnership to be considered as an entity and proceeded against as such is new, and before the Act of 1898 was almost unheard of. *In re Pincus,* 17 A.B.R. 331. But, as suggested by Mr. HOUGH in his article, 8 COL. L. REV., 599: "It is clear that only by accepting the Bertenshaw view (which is the very broadest view of the entity doctrine) can the courts live up to the language of the Act, a partnership being now a person for bankruptcy purposes. * * * It is true that one object of bankruptcy proceedings is to relieve the debtors, but it is quite as much an object to secure the equitable distribution of assets, and the latter procedure is first in order of time. Partners who wish a release from liability have an open path before them, but creditors who wish dividends and desire to prevent preferences, must act quickly, and should not be hampered by nice questions of possible solvency of individual partners. The Legislature 'builded better than it knew' and the duty of courts is to take the statutory words at their full value, and not prevent relief by adherence to old definitions that do not square with the result promised by the Act." The entity theory, when first announced by Judge THOMAS in *Chemical Bank* v. *Meyer, supra,* was stated and received in a limited way only, as are all new principles, by a bar inherently conservative; the decision was only that under § 5a, a partnership was an entity which could be adjudicated in bankruptcy as such. The idea was too revolutionary to receive complete acceptance at once, and when the question was again presented, the possibility of further extending its application was apparently curtailed by the court's decision that a partnership was not insolvent as an entity, but that the assets of all its members, together with its own, must be considered in determining its insolvency. *In re Blair, supra.* Later the application of the entity doctrine was further limited when it was held that if the partnership and some, but not all, of its members were adjudged bankrupt, a member not so adjudged could not claim the benefits of § 5h, but had to submit his property to administration with the firm's estate. *Dickas* v. *Barnes, supra.*

The opinions in these cases are the basis for all the limitations to which the doctrine has been subjected, and as has been seen, their basis is attributable primarily to conservatism, rather than to a reasonable construction of the Act and the plain result to which its words must surely lead.

Judge SANBORN in the *Bertenshaw* case meets the question fairly, construes the wording reasonably, and arrives at the result which must in reason obtain as the settled law on this subject eventually. If a partnership is an entity for any purpose, why not for all purposes in bankruptcy? His opinion points clearly to the way of handling the further questions of final settlements and discharge, which is certainly more expedient and not less equitable than that arrived at in any other way. The converse of this question, as has been said, has been determined, and it is now established in the Third Circuit, that when all the members are adjudged bankrupt, but the partnership—the entity —is not so adjudged, the members' trustees cannot administer the partnership property. Is it consistent to say, when confronted by the converse of the same question, that when the partnership and some members are adjudged bankrupt, the trustee can administer the unadjudicated member's estate against his will?

It has been lately held that the solvency of one partner is no defense to a proceeding in involuntary bankruptcy against the partnership and the other partner, and in case the adjudication is made, though the solvent partner may be required to file schedules, yet he may, at his election, administer the partnership property under § 5h. *In re Solomon & Carvel,* 163 Fed. 140, citing the *Bertenshaw* case. This is clearly inconsistent with the former holdings in the *Meyer* and *Blair* cases, previously decided in the same Circuit. And the reason for this inconsistency, as well as all the other varying views, reduces itself to the single question: How far will the court go in applying the entity theory?

The *Meyer* case, as has been shown, gave life to the entity theory and then immediately curtailed its application. The *Bertenshaw* case went to the full extent and declared that the partnership is an entity from first to last for all bankruptcy purposes. By the weight of reason, and by the increasing number of later cases leaning toward the latter view, it seems that ultimately a partnership will be uniformly declared to be an entity as an entity, for all purposes in bankruptcy, and it will be definitely determined that the individual estate of an unadjudicated partner cannot be summarily subjected to administration by the partnership trustee. G. E. H.

PRESUMPTION IN FAVOR OF REPLY LETTERS.—That a reply letter will be presumed to be genuine and to have been authorized, even after proof that the signature is not in the alleged sender's handwriting, was held by the court in the recent case of *Capital City Supply Co.* v. *Beury* (W. Va. 1911) 72 S. E. 657. In that case, which was an action in assumpsit, the plaintiff sought to prove that the defendant had assumed personal responsibility for the debts of a corporation of which he was president. Two letters were introduced to prove the defendant's written promise to pay, but the court held